

FACT SHEET



Omaha Lead Site Omaha, Nebraska

June 2002

INTRODUCTION

The U.S. Environmental Protection Agency (EPA) Region 7 is providing this fact sheet as a public guidance on the issues surrounding potential CERCLA liability of contractors who may work within the area of investigation of the Omaha Lead Superfund site (the "site"). The area of investigation extends from "L" Street to Ames Avenue and from 45th Street to the west side of the central business district and the west bank of the Missouri River north and south of the central business district in east Omaha, Nebraska. A concern has been raised that any contractor who works in this area and uncovers lead-contaminated soil may be potentially liable for the cost of any and all cleanup performed at the site. This fact sheet attempts to shed some light on these issues and dispel possible misperceptions about Superfund liability.

SITE DESCRIPTION

EPA proposed adding the Omaha Lead Site to the National Priorities List (NPL) on February 26, 2002. This has raised questions about the potential liability of contractors who perform work in the area of the site. While the area of investigation is nearly 20 square miles, the site only includes residential properties, child care facilities, schools, and other residential-type properties with high soil lead concentrations. The EPA is focusing on the areas where small children (6 years and under) congregate, because young children are the most affected by lead contamination and are at the greatest risk

Superfund Liability

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., also known as the Superfund law, was passed in 1980 and is based on the idea that the polluter of a property should pay for the cleanup of the property. For a party to be liable under this law, there must be a **release** of a **hazardous substance** from a **facility** which **causes the incurrence of response costs**, and the party must be one of the following with regard to the property or facility where the release occurred:

! **current owner or operator;**

! **former owner or operator at the time of disposal;**

! **generators; and**

! **transporters.**

from the exposure. EPA is not focusing its investigation on traditional commercial or industrial properties, so any work performed by contractors at commercial or industrial properties should be unaffected by the site listing.

CONTRACTOR LIABILITY

At least one surety company has issued a statement that it would no longer provide bonds to contractors performing work within the area of investigation of the site (extending from "L" Street to Ames Avenue and from 45th Street to the west side of the central business district and the west bank of the Missouri River north and south of the central business district). The reason given was a fear that any contractor who moves any amount of contaminated soil at the site could potentially be liable for the cost of the entire cleanup, estimated to cost up to \$100 million. The liability concerns seem to be based, in large part, on a 1992 California case, commonly known as the *Kaiser* case, where an excavation contractor, who was hired to grade and fill a site, could have been liable under CERCLA as an operator and a transporter for the entire cleanup of the site. The Court found that an excavation contractor could be liable as an operator or transporter for actions that worsen the conditions at a site, including actions that could spread the contamination to areas at a site that had previously been clean. However, this excavation contractor was later determined not to be liable for anything at the site. The question that has been raised is whether this precedent could potentially affect any contractor working in the Omaha area of investigation who may move residential yard soil to build room additions, or move, repair or install utilities.

The nature of the lead contamination in Omaha is such that contractors can easily limit their risks by taking proper precautions when excavating soil. The Omaha Lead site has only one contaminant of concern, lead, and it is found everywhere in the soils in east Omaha at varying concentrations. Because lead is found virtually everywhere, it would be difficult for anyone to prove that a contractor, who takes the proper precautions, made the lead contamination problem worse. As long as the soil excavated by a contractor remains in the same yard from which it was excavated, there should be no increase in the area of contamination, and thus no basis for anyone to claim that the contractor has aggravated or worsened the contamination.

The soil sampling and analysis conducted by EPA shows that the elevated lead concentrations in the soils at the site are found only in the top few inches of soil (0-8"). When contractors conduct excavation activities, the most likely result will be a reduction in soil lead concentration at the surface because of the mixing of shallow contaminated soils with deeper uncontaminated soils. As mentioned earlier, only residential or residential-type properties with high soil lead concentrations are part of the site. Commercial or industrial properties would not be considered part of the site, so work at those properties should be unaffected by the site listing.

Even in a worst case scenario, if a contractor did spread lead contamination to clean areas at a residential property and made the contamination problem worse, the contractor would only be responsible for the limited area that he/she contaminated, and would not be responsible for the cost of the cleanup at the entire site.

WHAT SHOULD CONTRACTORS DO

The EPA does not intend to pursue contractors who, in the course of their ordinary work, do not do anything to worsen the lead soil contamination problem in Omaha. Contractors should follow accepted construction practices and take reasonable precautions to limit risks. At a minimum contractors should:

- ! Use dust suppression techniques to limit dust leaving construction sites.
- ! Keep excavated soils at the property where they are excavated.
- ! Where possible, place excavated soils back into excavations and cover the area with “clean” soil.
- ! Contact EPA or the State of Nebraska with questions.

ADDITIONAL INFORMATION

If you have questions about this fact sheet, or need additional information regarding this site, please contact:

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